

1 UNITED STATES DISTRICT COURT  
2 DISTRICT OF NEVADA

3 J & J SPORTS PRODUCTIONS, INC.,  
4 Plaintiff,

Case No. 2:12-cv-01905-APG-CWH

5 v.

6 ORDER SETTING ASIDE DEFAULT AND  
7 DEFAULT JUDGMENT

8 EL CHAMIZAL, LLC, et al.,  
9 Defendants.

(Dkt. #23)

10 Plaintiff J & J Sports Productions, Inc. held the exclusive right to display certain closed-  
11 circuit television events such as the “WBO Light Middleweight Championship Fight.” Defendant  
12 El Chamizal, LLC is a local restaurant; defendant Juan Moreno owns and operates El Chamizal.  
13 Defendants allegedly intercepted and played J&J’s programming for El Chamizal’s patrons  
14 without J&J’s authorization. J&J filed this lawsuit claiming defendants’ conduct violates 47  
15 U.S.C. §§ 605 and 553.  
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17 Defendants failed to timely file an answer. The clerk of court entered default against them  
18 on June 27, 2013, and I ordered a default judgment for statutory damages in the amount of  
19 \$30,000.<sup>1</sup>  
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21 Defendants seek to set aside the default and default judgment. I find they have provided  
22 good cause to do so: (1) there is no apparent prejudice to J&J because there is no evidence its  
23 claims will be hindered; (2) defendants are not culpable because Moreno mistakenly relied on a  
24 third-party’s assurance that this litigation was being dismissed; and (3) defendants have raised a  
25 potential meritorious defense to J&J’s claims. But given defendants’ lengthy delay, I condition  
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28 <sup>1</sup> (Dkt. #19.)

1 the set-aside of the default and default judgment on their payment of reasonable attorney's fees to  
2 J&J for its fees related to litigating the default and default judgment.

3 **I. DISCUSSION**

4 I may "set aside an entry of default for good cause."<sup>2</sup> To determine "good cause," I  
5 "consider three factors: (1) whether the party seeking to set aside the default engaged in culpable  
6 conduct that led to the default; (2) whether [he] had no meritorious defense; or (3) whether  
7 reopening the default judgment would prejudice the other party."<sup>3</sup> This standard is disjunctive—  
8 a finding that any these factors is true is sufficient for me to refuse to set aside the default.<sup>4</sup> This  
9 is the same standard I apply when deciding whether to set aside a default judgment.<sup>5</sup>

11 "Crucially . . . judgment by default is a drastic step appropriate only in extreme  
12 circumstances; a case should, whenever possible, be decided on the merits."<sup>6</sup> "Where timely  
13 relief is sought from a default . . . and the movant has a meritorious defense, doubt, if any, should  
14 be resolved in favor of the motion to set aside."<sup>7</sup>

15 As a preliminary matter, J&J argues defendants' motion is untimely because it was not  
16 brought within a "reasonable time" as Rule 60 requires.<sup>8</sup> Reasonableness is a factual question  
17 judged on a case-by-case basis.<sup>9</sup> Part of the reason defendants delayed is that they were the  
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21 <sup>2</sup> Fed. R. Civ. P. 55(c).

22 <sup>3</sup> *United States v. Signed Pers. Check No. 730 of Yubran S. Mesle*, 615 F.3d 1085, 1091  
(9th Cir. 2010) (quotations omitted).

23 <sup>4</sup> *Id.*

24 <sup>5</sup> *Id.*

25 <sup>6</sup> *Signed Pers. Check No. 730 of Yubran S. Mesle*, 615 F.3d at 1091.

26 <sup>7</sup> *Id.* (citations omitted).

27 <sup>8</sup> Fed. R. Civ. P. 60(b)(1).

28 <sup>9</sup> *Ashford v. Steuart*, 657 F.2d 1053, 1055 (9th Cir. 1981).

1 apparent victim of a fraud by a third party. I find that, under the circumstances, defendants' delay  
 2 of less than four months<sup>10</sup> is reasonable and therefore their motion is timely.

3 But in order to set aside the default and judgment, I must still consider (1) whether  
 4 defendants were culpable, (2) whether they have meritorious defenses, and (3) whether J&J will  
 5 be prejudiced.

6 **A. Culpable conduct**

7 “[A] defendant’s conduct is culpable if he has received actual or constructive notice of the  
 8 filing of the action and intentionally failed to answer.”<sup>11</sup> “Intentionally,” in this context, means  
 9 the defendant acted in bad faith to take “advantage of the opposing party, interfere with judicial  
 10 decision-making, or otherwise manipulate the legal process.”<sup>12</sup>

12 Defendants allege they purchased J&J’s programming, for a substantial sum, from non-  
 13 party Zona Rosa, Inc.<sup>13</sup> Defendants aver they relied, in good-faith, on Zona’s assurances that this  
 14 litigation was a mistake and would be dismissed.<sup>14</sup> J&J fails to rebut defendants’ claim that their  
 15 failure to respond to this lawsuit was a good-faith mistake. There is no indication defendants  
 16 benefited, or hoped to benefit, from waiting to hire counsel and proceed with their defense. Their  
 17 mere negligent failure to respond is not culpable conduct for purposes of Rules 55 and 60.<sup>15</sup> This  
 18 factor weighs in favor of setting aside the default and default judgment.  
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23 <sup>10</sup> (Dkt. #19.)

24 <sup>11</sup> *Id.*

25 <sup>12</sup> *Id.*

26 <sup>13</sup> (Dkt. #23 at 10.)

27 <sup>14</sup> (*Id.*)

28 <sup>15</sup> *Signed Pers. Check No. 730 of Yubran S. Mesle*, 615 F.3d at 1091.

1           **B.    Meritorious defenses**

2           To satisfy the meritorious defense requirement, defendants must allege sufficient facts  
3 that, if true, would constitute a meritorious defense.<sup>16</sup> I need not determine whether those factual  
4 allegations are true at this stage.<sup>17</sup> J&J argues defendants have failed to provide documents in  
5 support of their alleged defense.<sup>18</sup> But a motion to set aside a default is not a forum to raise  
6 evidentiary disputes.<sup>19</sup> Defendants' allegations, for the purposes of this motion, are accepted as  
7 true.<sup>20</sup> The only question is whether defendants' allegations provide for a meritorious defense.  
8 And I find they do.

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10          First, J&J admits that defendants' good-faith allegations may warrant a reduction in  
11 damages. Other courts have confirmed that arguments directed at damages calculations qualify as  
12 meritorious defenses.<sup>21</sup> Second, defendants cite authority supporting their argument that a good-  
13 faith mistake—a defense supported by defendants' specific allegations—<sup>22</sup> may be a defense to  
14 J&J's general claims for liability under 47 U.S.C. §§ 605 and 553.<sup>23</sup>

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16           <sup>16</sup> *Id.*

17           <sup>17</sup> *Id.*

18           <sup>18</sup> (Dkt. #82.)

19           <sup>19</sup> *Signed Pers. Check No. 730 of Yubran S. Mesle*, 615 F.3d at 1091.

20           <sup>20</sup> *Id.*

21           <sup>21</sup> *Choice Hotels Int'l, Inc. v. Kusum Vali, Inc.*, No. 11CV1277 BTM WMC, 2012 WL  
22 1570844, at \*4 (S.D. Cal. May 3, 2012); *Key Bank of Maine v. Tablecloth Textile Co. Corp.*, 74  
23 F.3d 349, 354–55 (1st Cir.1996). J&J seems to argue that defenses to damages calculations are  
24 not “meritorious defenses.” But J&J cites little authority for this proposition and what it does cite  
25 is ambiguous on this question. *See J & J Sports Prods., Inc. v. Aviles*, No. 5:10-CV-04213-  
26 JF/HRL, 2011 WL 1884617, at \*3 (N.D. Cal. May 18, 2011) (rejecting damages defense because  
27 allegations in complaint regarding damages need not be accepted as true—not holding that  
28 defenses directed to damages are not “meritorious” for purposes of setting aside a default).

26           <sup>22</sup> (Dkt. #23 at 10.)

27           <sup>23</sup> *See, e.g., J & J Sports Prods., Inc. v. Gidha*, No. CIV-S-10-2509 KJM, 2011 WL  
3439205, at \*3 (E.D. Cal. Aug. 4, 2011); *J & J Productions, Inc. v. Schmalz*, 745 F.Supp.2d 844

1 This factor weighs in favor of setting aside the default.

2 **C. Prejudice to plaintiffs**

3 “To be prejudicial, the setting aside [of the default] . . . must result in greater harm than  
4 simply delaying resolution of the case.”<sup>24</sup> Rather, the question is whether plaintiffs will be  
5 hindered in their ability to pursue their claim.<sup>25</sup> Defendants argue that setting aside the default  
6 will not prejudice J&J. They point out that mere delay is not prejudice, and that delay is the only  
7 harm plaintiffs have suffered. J&J fails to identify how they will be hindered in pursuing their  
8 claims if I set aside the default.<sup>26</sup> This factor also weighs in favor of setting aside the default.

9 **D. Conclusion**

10 All three factors weigh in favor of setting aside the default and judgment. There is no  
11 evidence defendants acted in bad faith, they have raised a potentially meritorious defense, and no  
12 cognizable prejudice to J&J is apparent. Given that a default and default judgment are drastic and  
13 disfavored measures, I set them aside.

14 However, I have wide discretion to condition the setting aside of a default upon the  
15 defaulting party’s payment of the non-defaulting party’s attorneys’ fees.<sup>27</sup> Given defendants’  
16 delay in seeking to set aside the default, and the unfairness to J&J who was forced to litigate the  
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21 (S.D.Oh.2010) (holding defendant was not liable under § 553 where it purchased program from  
22 cable provider on commercial account); *G & G Closed Circuit Event, LLC v. Nguyen*, No. 5:10-  
23 CV-05722 EJD, 2012 WL 900750, at \*2 (N.D. Cal. Mar. 15, 2012) (“District Courts have  
24 reached conflicting conclusions regarding whether strict liability applies to good faith  
25 purchases.”).

26 <sup>24</sup> *TCI Grp. Life Ins. Plan v. Knoebber*, 244 F.3d 691, 701 (9th Cir. 2001), as amended on  
27 denial of reh'g and reh'g en banc (May 9, 2001).

28 <sup>25</sup> *Falk v. Allen*, 739 F.2d 461, 463 (9th Cir. 1984).

<sup>26</sup> *TCI Grp. Life Ins. Plan*, 244 F.3d at 701.

<sup>27</sup> *Nilsson, Robbins, Dalgarn, Berliner, Carson & Wurst v. Louisiana Hydrolec*, 854 F.2d  
1538, 1546 (9th Cir. 1988).

1 default and judgment, I am conditioning the setting aside of the default upon defendants' payment  
2 of J&J's reasonable attorney's fees relating to the default and default judgment. Plaintiff will  
3 submit an affidavit and appropriate documentation so that I may determine an appropriate award.


4 **II. CONCLUSION**

5 IT IS THEREFORE ORDERED that defendants' El Chamizal, LLC and Juan Moreno's  
6 motion to set aside default and default judgment (Dkt. #23) is GRANTED.

7 IT IS FURTHER ORDERED that the clerk's entry of default against defendants (Dkt.  
8 #12) and default judgment against defendants (Dkt. #19) are VACATED. However, this relief is  
9 conditioned upon defendants paying to J&J reasonable attorneys' fees in an amount I will  
10 determine. J&J shall submit an affidavit and appropriate documentation supporting a request for  
11 attorneys' fees incurred in connection with obtaining the default and default judgment by  
12 February 27, 2015.  
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14 IT IS FURTHER ORDERED that defendants shall file an answer to the complaint no later  
15 than March 10, 2015. However, if defendants do not pay J&J the attorneys' fees I subsequently  
16 award, I may strike their answers and reinstate default and default judgment.  
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18 DATED this 17<sup>th</sup> day of February, 2015.

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21 ANDREW P. GORDON  
22 UNITED STATES DISTRICT JUDGE  
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